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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DUANE EDWARD MICK,

Defendant and Appellant.

E046395

(Super.Ct.No. FVA025683)

OPINION

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Affirmed as modified.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Chandra E. Appell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Duane Edward Mick (hereafter defendant) appeals from the judgment of conviction entered after a jury found him guilty of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1)¹ and further found true the special allegation that in the commission of the crime he personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1).²

Defendant raises two claims of error in this appeal. First he contends that because use of a deadly weapon is an element of the crime of assault with a deadly weapon, the trial court should have dismissed that enhancement. The Attorney General concedes the error. Defendant also contends the trial court erred in denying his motion for new trial which defendant based on various claims including ineffective assistance of counsel. We conclude the Attorney General's concession is appropriate, and also conclude that the trial court correctly denied defendant's motion for new trial. Therefore, we will modify the judgment accordingly, and affirm.

FACTS

On November 5, 2005, about 1:00 a.m. Duane Hoos walked by defendant's house and saw defendant standing in the driveway behind a vehicle. Hoos heard defendant mumbling, turned to say something to him, and then continued walking. Hoos had walked about two houses beyond defendant's house when defendant came flying at Hoos

¹ All further statutory references are to the Penal Code unless indicated otherwise.

² The jury returned a not true finding on a great bodily injury enhancement under section 12022.7, subdivision (a).

and struck him in the back, under his left shoulder blade, with a fishing gaff. Hoos raised his arm to protect himself, and as a result defendant's second blow hit Hoos in the forearm. Defendant lost control of the gaff and, when Hoos lunged at him, defendant bit Hoos under the nose. Hoos in turn bit defendant on the lip. Hoos was bleeding profusely and went to a hospital emergency room for treatment. The wound on Hoos's back required one or two stitches. The wound on his left forearm could not be closed because according to Hoos the gaff tore "a chunk out, and they said to just leave that alone, couldn't stitch it up."

At the time of the incident defendant and Hoos had known each other about 35 to 40 years, and both were involved with Kerry Wakefield, a woman Hoos acknowledged was their shared girlfriend. According to Hoos, he and Ms. Wakefield had been together from the late afternoon until about 10:00 p.m. prior to the incident. Around 7:00 p.m. or 8:00 p.m. Hoos started to drink mixed drinks and consumed three, although he was not drunk and was able to recognize defendant as his assailant and the fishing gaff as the weapon. Hoos acknowledged that at the time of trial he was incarcerated because his probation had been revoked after he had "tested dirty for alcohol."

San Bernardino County Deputy Sheriff Jose Ruiz responded to the stabbing call in the early morning hours of November 5, 2005, and found Hoos covered in blood sitting on the street curb. After speaking with Hoos, Deputy Ruiz went to defendant's home but defendant was not there. When the deputy located defendant a few hours later, defendant was wearing a shirt that had what appeared to be blood spatters on the front. The deputy

arrested defendant. In a later search of defendant's garage, Deputy Ruiz recovered a weapon that fit Hoos's description of the fishing gaff defendant used in the assault. The fishing gaff also had spatters of what appeared to the deputy to be blood.

Kerry Wakefield testified in pertinent part that she was not with Hoos but was with defendant during the evening of November 4, 2005. Around 10:00 p.m. Wakefield saw Hoos at the corner of the street as she and defendant walked from her sister-in-law's house to defendant's house. Hoos was drunk and yelling obscenities at defendant and Wakefield. Wakefield testified that days earlier she had left Hoos a letter telling him she no longer wanted to see him.³ Wakefield and defendant were in defendant's garage when they heard Hoos yelling more obscenities from out front. Wakefield heard something hit defendant's truck. Defendant went out to check and remove some of his fishing gear from the truck. He was walking back to the garage when Hoos "swung on" defendant. Wakefield saw Hoos swing after which defendant and Hoos started to fight over the fishing gaff, pulling it back and forth between them. The fight stopped when Hoos "got caught with that hook." Hoos yelled at defendant that "he had him now," and then Hoos left, presumably to call the police. According to Wakefield, defendant had blood on his face when the fight was over but he was locked out of his house so he could not change his clothing. Defendant and Wakefield went to the house of another friend where Deputy Ruiz contacted defendant a few hours later.

³ In his testimony Hoos stated that he had gone to Ms. Wakefield's house to return "a bad letter" and was on his way home when he walked past defendant's house and the altercation occurred.

DISCUSSION

1.

WEAPON USE ENHANCEMENT

The Attorney General, as previously noted, concedes that the trial court erred in failing to dismiss the section 12022, subdivision (b)(1) enhancement for personal use of a deadly weapon. We conclude the concession is appropriate. As expressly stated in the statute, the enhancement applies only when use of a deadly weapon is not an element of the offense charged.⁴ Because use of a deadly weapon is an element of the crime of assault with a deadly weapon in violation of section 245, subdivision (a)(1) charged in this case, the section 12022, subdivision (b)(1) enhancement does not apply. (See *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [“A conviction under section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b).”].) Therefore, we will dismiss the enhancement.

2.

NEW TRIAL MOTION

Defendant contends the trial court should have granted his motion for new trial. We disagree.

⁴ Section 12022, subdivision (b)(1) states, “Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.”

In his new trial motion, defendant asserted he was denied the effective assistance of counsel because his trial attorney did not investigate (1) witnesses defendant had identified who could testify regarding Hoos's reputation for being a violent person, (2) defendant's suspicion that Hoos might be an informant for Deputy Ruiz, and (3) defendant's concern that Wakefield might have been talking in the hallway outside the courtroom during a recess about how defense counsel had coached her to testify and might have been overheard by jurors. To support his motion defendant submitted a declaration in which he stated, in pertinent part, that he had given his various attorneys "[his] witnesses prior to trial," and had indicated his belief that Hoos had an "ongoing relationship with Deputy Ruiz that would have been critical to [his] defense." Defendant attached to his declaration several undated, handwritten pages, presumably as support for his various assertions.

In addition to the declaration, defendant testified at the hearing on his new trial motion and stated, among other things, that five different attorneys had represented him in this matter; that he believed but could not remember for certain that he told Ms. Vose, the attorney who represented him at trial, some or all of the names of potential witnesses who might assist defendant at trial; that he believed Ms. Vose asked him if he knew of any other acts of violence or vandalism committed by Hoos; and that what defendant knew about Hoos's reputation for being a violent person was not "substantiated," and in defendant's view was hearsay, so "[t]here wasn't nothing to tell [the attorney]."

Ms. Josephine Moramarco, one of the potential witnesses defendant had identified in his motion for new trial, also testified at the hearing and stated in pertinent part that she knew both defendant and Hoos; that she was aware of physical confrontations Hoos had with persons other than defendant; that she was aware of acts of vandalism Hoos had committed; and that she was aware of incidents in which Hoos had attempted to provoke defendant and had challenged defendant to fight.

The prosecutor called defendant's trial attorney, Ms. Vose, as a witness at the hearing on defendant's new trial motion and she testified that the only relevant testimony in her view was that of Kerry Wakefield because Ms. Wakefield was the only percipient witness. Ms. Vose acknowledged that "the reputation in the community of Mr. Hoos as a violent, confrontational, assaultive character would be relevant in a self-defense case for [defendant]." Nevertheless Ms. Vose did not "make any inquiries of anyone as to who else may have been victimized by Mr. Hoos[.]" In her view, testimony from the other witnesses would have been cumulative because Ms. Wakefield testified that Hoos had a reputation for being violent.

In denying defendant's motion, the trial court found that defendant's showing did not address the issue of whether Hoos was an informant and did not address whether jurors were exposed to any out-of-court statement made by Ms. Wakefield. The trial court also found that the testimony of other witnesses regarding prior incidents of violence or aggression between defendant and Hoos was cumulative to Ms. Wakefield's

trial testimony on that subject, and in any event failure to present additional testimony in that regard was not prejudicial.

Defendant purports to challenge all aspects of the trial court's ruling on his new trial motion. Because defendant's motion for new trial is predicated on a claim of ineffective assistance of counsel, we review that motion according to the standard pertinent to such claims. In order to establish a claim of ineffective assistance of counsel, defendant must "demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668.) In evaluating counsel's actions at trial, "A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] Thus, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. [Citation.]" (*People v. Dennis, supra*, at p. 451.)

Defendant did not present any evidence to support his suspicion that Ms. Wakefield had made comments outside the courtroom that might have been overheard by jurors. Although at the hearing on his new trial motion defendant submitted what he

described as statements from various potential trial witnesses, including Ms. Wakefield, her purported statement only addressed the issue of whether Hoos has a reputation for being violent.⁵ Defendant also did not present any evidence to support his belief that Hoos and Deputy Ruiz had a relationship based on Hoos being an informant for the deputy. Defendant's unsubstantiated belief, or suspicion, that either or both assertions were true is not sufficient to impose an obligation on trial counsel to investigate. Defendant could have called Ms. Wakefield and Deputy Ruiz to testify at the hearing on his new trial motion, but he did not do so. The only evidence presented in support of defendant's new trial motion was limited to the issue of Hoos's reputation for violence. We limit our discussion, accordingly.

In order to establish deficient performance, the first prong of an ineffective assistance of counsel claim, defendant had to show that evidence of Hoos's reputation as a violent person was relevant to an issue at trial and therefore a reasonably competent attorney would have presented such evidence. Evidence that Hoos had a reputation for being violent would be relevant to prove he was the aggressor. (Evid. Code, § 1103; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-447.) In this case there was no dispute that Hoos was stabbed with the fishing gaff. The only issue was how that stabbing occurred. Defendant did not testify at trial, and therefore did not claim that he acted in self-defense. Instead he argued, based on the testimony of Ms. Wakefield, that

⁵ The purported statements are not verified or signed under penalty of perjury and in fact are nothing more than reports prepared by a defense investigator of posttrial interviews conducted with the various purported witnesses.

Hoos was stabbed accidentally while he and Hoos were grappling over the fishing gaff after Hoos attacked defendant while defendant was removing the fishing gaff from his truck. That defense did not turn on whether Hoos was a violent person, and therefore most likely had attacked defendant. The credibility of the accident defense claim turned on the actual circumstances of the altercation as observed by the only percipient witness, Ms. Wakefield.

Defendant also claims that evidence of Hoos's reputation as a violent person was relevant to self-defense. Although the trial court instructed the jury on self-defense because it arguably was supported by the evidence, we do not share defendant's view that he actually relied on that defense at trial. As previously noted, defendant did not testify at trial, a decision that effectively eliminated a viable claim of self-defense because without defendant's testimony the jury could not assess what defendant actually believed about the need to protect himself. Once defendant elected not to testify, trial counsel could reasonably conclude that additional evidence of Hoos's reputation for violence was not necessary to establish the only remaining defense, that of accident. Defendant does not demonstrate how additional evidence on that subject would be anything other than cumulative to the testimony of Ms. Wakefield regarding Hoos's reputation as a violent person. In short, defendant failed to demonstrate that by not calling additional witnesses to testify about Hoos's reputation for violence, trial counsel's performance was deficient.

For these same reasons, even if we were to conclude that trial counsel's performance was deficient because she did not call additional witnesses to testify

regarding Hoos's reputation for being a violent person, we nevertheless would conclude that defendant did not demonstrate prejudice as a result of trial counsel's purported oversight. As previously discussed, Ms. Wakefield testified about other violent acts Hoos had committed, and also testified about his actual conduct on the night in question. Defendant has not demonstrated that if the jurors had heard additional testimony about Hoos's reputation for being a violent person, it is reasonably probable they would have reached a result more favorable to him.

In summary we conclude that defendant did not meet his burden of establishing his ineffective assistance of counsel claim, the only ground upon which he moved for a new trial. Therefore, we must conclude the trial court properly denied that motion.

DISPOSITION

The judgment is modified by dismissing the enhancement under section 12022, subdivision (b)(1), and as modified, is affirmed. The trial court is directed to prepare and forward to the appropriate agencies an amended abstract of judgment that correctly reflects the modified sentence.

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/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Miller
J.